87-130

Supreme Court, U.S.
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In The Supreme Court of the United States

OCTOBER TERM, 1987

GLENN BELL, DALE W. STUPER, DAVID J. STUPER, MARTIN J. COOLEY, DALE BROWN, Drivers; FRANCES McALLISTER, BARBARA F. McALLISTER, ALAN F. GILDEMEYER, RICHARD AXE, Packers; and PAT EUSON, Helper,

Petitioners

vs.

TEAMSTERS LOCAL UNION NO. 317, Syracuse, New York, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

and

NAUM MOVING AND STORAGE COMPANY, INC.,

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

WILLIAM SIMS, ESQ.
Attorneys for the Petitioners
280 Humboldt Parkway
Buffalo, New York 14214
Tel: (716) 881-1322

SCOTT D. RODMAN, ESQ.
Of Counsel

62 pp

QUESTIONS PRESENTED

1. Did the district court err in dismissing the complaint for failure to prosecute because plaintiffs' attorneys failed to appear at a status calendar call due to the attorneys' failure to notify the court of a change of address, when: (1) there was no finding of wilfull contempt or contumacious conduct on the part of the attorneys; (2) the case had been filed only 1½ years prior to the dismissal; (3) extensive discovery had taken place; and (4) there was no determination of whether the complaint was meritorious?

2. Did the district court err in dismissing the complaint for failure to prosecute thereby punishing the clients for the mistakes or omissions of their attorneys without a clear record of delay, wilfull contempt or contumacious conduct on the part of the attorneys?

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In The Supreme Court of the United States

OCTOBER TERM 1987

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners, GLENN BELL, et.al., respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on April 2, 1987.

OPINIONS BELOW

The Opinion of the Court of Appeals, not yet reported, is attached to this petition as Appendix A. The prior opinion of the United States District Court for the Northern District of New York, not yet reported, is attached to this petition as Appendix B.

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on April 2, 1987. This petition for certiorari was filed within 90 days of the former date. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES RULES AND REGULATIONS INVOLVED

Rule 11 of the General Rules of the Northern District provides that:

> "Civil causes in which no action has been taken for more than one year may be called for review upon not less than fifteen (15) days' notice by mail addressed to the attorneys of record, or to the parties if appearing pro se. The Court may thereupon enter an order dismissing the cause for want of prosecution, or continuing it, or may make such other order as justice may require."

Federal Rule of Civil Procedure 60(b) provides in pertinent part:

> "(b) MISTAKES; INADVERTENCE; EXCUSABLE NEGLECT; NEWLY DISCOVERED EVIDENCE; FRAUD, ETC. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence

which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment.

STATEMENT OF THE CASE

This case presents for review the affirmance by the Court of Appeals for the Second Circuit, of an order by the District Court Judge of the Northern District of New York denying petitioners' motion for relief from an order of dismissal for lack of prosecution.

This action was filed on March 29, 1985 as a hybrid §301/Duty of Fair Representation suit. Petitioners are former union members of Teamsters Local No. 317 (hereinafter "UNION") and former employees

of Naum Moving and Storage, Inc. (hereinafter **"NAUM"**).

The complaint alleges a cause of action against NAUM for violation of a collective bargaining agreement between the petitioner union members and NAUM; and against the UNION for breach of fair representation in connection with negotiations for a new labor agreement. The complaint also alleges violations by the UNION of the Constitution of the International Union and of its by-laws.

A three year collective bargaining agreement between the parties was scheduled to expire on March 31, 1984, but prior to the expiration date, and according to the terms of the agreement, the UNION noticed NAUM that it wished to modify the agreement. Petitioners claim that the agreement continued in effect by operation of law and by the conduct of the parties.

The complaint alleged that the UNION breached its duty of fair representation by, **inter alia:** (1) not pressing for an agreement during the summer of 1984 (the busiest season of the year when the UNION had the best advantage); (2) by encouraging and directing an unannounced strike vote by 5 members of an approximately 18 member unit; (3) by maintaining the strike against the best interests of its members; and (4) failing to tell the members of the UNION that they had been temporarily and later permanently replaced and other information which was pertinent to the members' ability to choose intelligent alternatives during the period.

The complaint further alleged that NAUM had failed to bargain in good faith.

Petitioners claim that the alleged acts upon which the claim is based fell within the six year period (for violations of the UNION constitution) and alterna-

tively within the 6 month period of **Del-Costello v. International Brotherhood of Teamsters**, 462 U.S. 151, (1983) and that by either standard, the acts complained about were timely brought in the complaint.

Within two weeks after serving the summons and complaint in this action, petitioners served requests for production of documents on both respondent UNION and respondent NAUM, who complied with said discovery demands in May, 1985. Thereafter, respondent UNION served interrogatories and requests to produce upon petitioners to be answered individually by each of the named petitioners. Respondent UNION moved for and obtained an order compelling answers to the interrogatories and production of documents. Thereafter, answers to the interrogatories were served upon the UNION in September 1985, consisting of a total of approximately 155 pages.

Two of the 10 petitioners named in the complaint failed to answer the interrogatories, yet no motion was made by respondents for preclusion or other relief against said two petitioners.

The remaining 8 petitioners answered all of respondent's interrogatories except for one which inquired about petitioners' basis for a claim for conspiracy between respondents UNION and NAUM, for which they had no evidence during that stage of discovery. Although only one interrogatory was left unanswered and two petitioners failed to answer the interrogatories, Judge Munson's Memorandum-Decision and Order of January 7, 1987 (**Exhibit B**), found that ". . . plaintiffs . . . had not complied with an order of this court issued August 13, 1985 compelling plaintiffs to comply with defendants' discovery requests."

Upon information and belief, by notice dated September 8, 1986, respondents were instructed to appear before the district court at a Dismissal Calendar Call on September 26, 1986 and show cause why the action should not be dismissed. Both of petitioners' attorneys, SCOTT D. RODMAN and BARBARA M. SIMS allege that they did not receive said notice and therefore did not appear or respond.

It was later learned that the clerk's office of the district court did not have Mr. Rodman's new address due to the moving of his law practice to Buffalo, NY. It was assumed by the Court that a notice was mailed to Attorney Rodman's former law office, but Attorney Rodman affirmed to the Court that (1) mail sent to his former address was routinely forwarded to his current address; and (2) he never received said notice.

This case had been placed on the dismissal calendar because no activity appeared on the court docket for the previous 12 months. However, at the time of the scheduled calendar call, petitioners had been preparing two motions: (1) to amend the complaint, based upon the information they had learned from their requests of respondents through petitioners' discovery demands, and (2) for an order for leave to electronically record oral depositions.

On September 26, 1986, attorneys for respondents UNION and NAUM appeared at the Dismissal Calendar Call and presented argument in support of dismissal for lack of prosecution. After hearing argument, the district court dismissed the action for lack of prosecution. An order of dismissal was entered on October 3, 1986. **Appendix C.**

The complaint had been dismissed

by the district court for lack of prosecution only 1½ years from the date of the service of the summons and complaint.

Upon receiving the order of dismissal (sent to petitioners' lawyers by respondents' attorneys who had the changed address of petitioners' attorneys based upon their correspondence with petitioners' attorneys during discovery), petitioners immediately submitted an order to show cause which was received by the Court on October 9, 1986. The order to show cause which was brought pursuant to Federal Rule 60(b) for relief from the order of dismissal, was signed by Judge Munson on October 23rd.

In the motion papers, petitioners submitted affidavits probative of the issue of why they did not receive notice of said status calendar call. The affidavits affirmed that when this action was initiated, co-counsel RODMAN and SIMS prosecu-

ted this action through Mr. Rodman's law office in Baldwinsville, NY. Both attorneys were listed at this address, which is located within the Northern District of New York. In April 1986, Mr. Rodman moved his law practice from Baldwinsville, NY to attorney SIMS' law office in Buffalo, New York, which is located within the Western District of New York.

Immediately upon leaving his Baldwinsville law office, Mr. Rodman entered a change of address notice with the Baldwinsville Post Office with instructions to forward his mail to his new Buffalo office address. In addition, individual change of address notices were sent to all courts, clients and correspondents. Upon information and belief, no change of address notice was received by the Northern District of New York regarding this case.

It was never determined by a hear-

ing or otherwise, why the notice, if actually sent by the Clerk's office to petitioners' attorneys, was not forwarded to Mr. Rodman's new office address as per his forwarding order with the U.S. Post Office.

Also included in the order to show cause were the drafted motion papers which were being prepared by petitioners prior to the scheduled dismissal calendar call. The purpose of the inclusion of these papers was to show the Court that not only had extensive discovery been done by both petitioners and respondents, but work on this case was in progress by petitioners at the time of the status calendar call.

A timely notice of appeal of the district court's dismissal for lack of prosecution was filed by petitioners on October 28, 1986. Said appeal was withdrawn by stipulation of all parties on December 31, 1986, pending the district

court's decision of petitioners' 60(b) motion.

Oral argument was held on petitioners' 60(b) motion on November 7, 1986.

On January 7, 1987, the district court issued a Memorandum-Decision and Order denying petitioners' motion for relief from the October 3, 1986 Order of Dismissal. **Appendix B.** In said decision, Judge Munson noted that petitioners' attorneys neglected this case in the following manner:

"(1) failure to take any action on the case as reflected on the docket in over one year;"

As discussed above, extensive discovery had already been done, and at the time of status calendar call, the attorneys were preparing two motions on behalf of petitioners.

"(2) failure to respond to defendant Teamsters' discovery requests over

one year after being ordered to do so;"

As discussed above, this finding was inaccurate.

"(3) failure to advise the court, the clerk, or opposing counsel of their change of address to outside of the district or designating local counsel within the district;"

Opposing counsel were aware of counsel's new address by virtue of the discovery which had taken place, and upon information and belief, the clerk's office failed to receive notice of counsel's change of address.

"(4) failure to appear at the status calendar on July 26, 1985;"

Petitioners' counsel sent their law clerk, subsequent to which no sanction was imposed upon petitioners nor any warning given of a future sanction.

"(5) failure to appear at the dismissal calendar on September 26, 1986."

This point is discussed above.

On January 12, 1987, petitioners reinstated their appeal before the Court of Appeals for the Second Circuit.

On February 4, 1987, petitioners moved the district court to reargue and/or reconsider the Court's denial of the 60(b) motion. The motion was adjourned and later submitted.

On April 1, 1987, the appeal before the Second Circuit was argued, and on April 2, 1987, the judgment of the district court was unanimously affirmed. **Appendix A.**

No decision was made on petitioners' motion to reargue/reconsider the prior 60(b) motion.

The factual issues of the complaint and the basis of petitioners' legal claims were highly disputed by respondents. However, there was never any hearing on the merits and no determination of

the legal issues by the Court by summary judgment or otherwise. Without these issues being fully briefed or argued, the Court noted in its decision of January 7, 1987:

> "In order to avoid needless protraction of litigation, it is necessary to be relieved from judgment under Rule 60(b), that a plaintiff demonstrate that he has a meritorious claim. This does not appear to be so in this case."

(emphasis added).

This action was dismissed for failure to prosecute and thus this issue is the gravamen of the appeal to the Second Circuit and of the petition herein.

I. THE DISTRICT COURT'S DISMISSAL FOR LACK OF PROSECUTION IS CONTRARY TO THIS COURT'S HOLDING IN LINK v. WABASH RAILROAD CO.

In **Link v. Wabash Railroad Co.**, 370 U.S. 626 (1962), this Court upheld the dismissal for failure to prosecute by the District Court when plaintiff's counsel failed to appear at a pre-trial conference. Although the holding is contrary to the position urged by petitioners herein, it is respectfully urged that the **Link** Court faced more egregious circumstances than the case at bar, and decided the case by a narrow 4 - 3 vote, with two justices taking no part in the decision.

The **Link** case had been pending for 6 years before it was dismissed, and there was a considerable history of delay on the part of the attorney. In the case at bar, the action was commenced $1\frac{1}{2}$ years before it was dismissed. There was no history

of failure to appear, although Hon. Howard G. Munson, U.S.D.C.J., pointed out that plaintiffs' counsel had sent a law clerk to a prior status calendar call when they were not able to appear or to get an adjournment.

In the **Statement of the Case**, above, counsel have outlined the equities to include: (1) there had been extensive discovery by both parties during the early part of the lawsuit; (2) the lawsuit was only 1½ years old; (3) the non appearance by the attorneys was for a procedural appearance; (4) there was no hearing to determine whether a notice had actually been sent to plaintiffs' attorneys or why the notice if sent, had not been forwarded to the attorneys pursuant to a forwarding order at the local post office; (5) there was no fully briefed argument by counsel or a finding by the fact regarding the merits of the dismissed complaint; (6)

plaintiffs' counsel responded immediately upon being noticed of the dismissal. **Greater Baton Rouge Golf Assoc. v. Recreation & Park Commission**, 507 F.2d 227 (5th Cir., 1975); and (7) the papers submitted to the court for plaintiffs' 60(b) motion to relieve plaintiffs of the default included drafted motions manifesting that work was in progress on this case at the time it was dismissed.

Justice Black, with whom Chief Justice Warren dissented, stated that " . . . the order of the District Court dismissing this case has no sound basis in law, in fact or in justice."

II. BECAUSE THERE IS A CONFLICT IN THE DECISIONS AMONG THE CIRCUIT COURTS REGARDING THE GROUNDS FOR DISMISSING A COMPLAINT FOR FAILURE TO PROSECUTE, THE SUPREME COURT SHOULD REVIEW THIS ISSUE.

In a case closely on point with the petitioners' case, the 5th Circuit Court of Appeals reversed the dismissal of the district court. **Blois v. Friday**, 612 F.2d 938 (C.A.5th Cir., 1980). In **Blois, supra**, plaintiff's attorney failed to reply or to appear for a summary judgment motion because he did not receive notice of the motion. Plaintiff's attorney had neglected to file a notice of his change of address with the district court clerk.

The 5th Circuit noted that plaintiff's counsel had "even recently prepared a motion for summary judgment on plaintiff's behalf" (**Blois, supra**, at 942), and plaintiff's Rule 60(b) motion was filed within five days of the date that he became aware that a default judgment had been granted.

Also in the 5th Circuit, in **Greater Baton Rouge Golf Association v. Recreation & Park Commission**, 507 F.2d 227 (5th

Cir., 1975), a default for failure to appear, was set aside which was caused by counsel's oversleeping. The Court held that: "[W]e are of the opinion that dismissal with prejudice was too harsh a remedy for this inept although unintentional, conduct of counsel." **Greater Baton Rouge, supra,** at 229.

In the case at bar, there was no finding by Judge Munson of intentional conduct on the part of plainitffs' attorneys.

In **Ellingsworth v. Chrysler,** 665 F.2d 180 (7th Cir., 1981), the 7th Circuit Court of Appeals reversed the denial of a motion to set aside a default judgment in which neither the defendants nor their attorney appeared at trial. Defendants claimed that they misunderstood the date set for trial. The Court held at 185:

> "A default judgment, like a dismissal, is a harsh sanction which

should usually be employed only in extreme situations, or when other less drastic sanctions have proven unavailing. **Boazman v. Economics Laboratory, Inc.**, 537 F.2d 210, 212 (5th Cir. 1976); **Flaska v. Little River Marine Construction Co.**, 389 F.2d 885, 887 (5th Cir.), cert. denied, 392 U.S. 928, 88 S.Ct. 2287, 20 L.Ed2d 1387 (1968). Thus, it is appropriate that Rule 60(b)(1) be liberally applied in the context of default judgments, especially where those judgments result from honest mistakes rather than willful misconduct, carelessnes or negligence. **Seven Elves, Inc. v. Eskenazi**, 635 F.2d 396, 402 (5th Cir. 1981)."

Even within the Second Circuit itself, there is a conflict of the standards used to dismiss cases for failure to pro-

secute under similar circumstances.

The Second Circuit reversed a default judgment for failure to appear for trial due to some confusion between plaintiff and his attorney regarding the time that the trial was to begin, notwithstanding that the trial court found both plaintiff and his attorney at fault.

> "We agree that these facts demonstrate a failure of good judgment on the part of both, and their conduct on Monday morning was an affront to the court. Nevertheless, imposition of the most 'drastic remedy' available to the court was not justified by these circumstances."

Peterson v. Term Taxi Inc. 429 F.2d 891, (2nd Cir. 1970). In citing **Davis v. United Fruit Co.**, 402 F.2d 619, 620 (2nd Cir., 1969), the court stated: "[N]evertheless, as we said in **Davis, supra,** 'a

court must not let its zeal for a tidy calendar overcome its duty to do justice.' 402 F.2d at 331."

In another case, the Second Circuit, found "legal and geographical complications" as excusable neglect, and reversed a dismissal based upon an asserted failure to prosecute, failure to appear and failure to comply with the district court's discovery order. **Foley v. U.S.**, 645 F.2d 155, (C.A. 2d., 1981).

In **Meehan v. Snow**, 652 F.2d 274, (C.A.2d, 1981), the Second Circuit reversed the trial court which denied a motion to set aside a default judgment in which defendants were ten days late in serving an amended answer. The Court stated: "[D]efaults are not favored, particularly when the case presents issues of fact, and doubts are to be resolved in favor of a trial on the merits. See **Klapprott v. United States**, 335 U.S. 601, 69 S.Ct. 384,

93 L.Ed. 266 (1949). . . [and] . . . the extreme sanction of a default judgment must remain a weapon of last, rather than first resort." **Meehan, supra,** at 277.

In the Court of Appeals for the District of Columbia, a dismissal was reversed which was based on the failure of appellant's former attorney to get notice of the impending dismissal. **Bibeau v. Northeast Airlines, Inc.,** 429 F.2d 212, (C.A.D.C., 1970).

District Courts have granted Rule 60(b) relief from dismissals for failure to appear because of a clerical error in the attorney's office (**Horn v. Intelectron Corp.,** 294 F.Supp. 1153, [S.D.N.Y., 1968], at 1155); because of confusion resulting from dismissing one attorney and employing another (**Bavouset v. Shaw's of San Francisco,** 43 F.R.D. 296, [S.D.Texas, 1967]); and confusion caused by someone other than the attorney picking up the mail (**McVicker**

v. Donnelly, 95 F.R.D. 353 [(D.C.Pa., 1982]).

III. **PLAINTIFFS IN THIS ACTION SHOULD NOT BE PENALIZED FOR THE MISTAKES OR OMISSIONS OF THEIR ATTORNEYS, THEREBY DENYING THEM THEIR DAY IN COURT.**

In the **Link, supra**, case, Justice Black with Chief Justice Warren, condemn the harsh result which came about by following the generalized statement that when a client voluntarily chooses his attorney as his representative, the client cannot avoid the consequences of the acts or omissions of this freely selected agent.

> "This case is a good illustration of the deplorable kind of injustice that can come from the acceptance of any such mechanical rule. * * * This ruling of course should never have been made, for it was plainly inconsistent with the whole philosophy underlying

the modern liberal rules of procedure which govern civil trials in the federal courts."

Dissent of Justice Black, **Link, supra**, 370 U.S. at 645.

Justice Black goes no to reason that a plaintiff's cause of action is valuable property within the generally accepted sense of that word, and as such is entitled to the protection of the Constitution which affords the due process protections of notice and a hearing.

Justice Black further reasoned that such overzealous protection of the court's docket may have the opposite effect because additional litigation is caused by the dismissal itself. It is respectfully submitted, that in the case at bar, this theory is true manifested by the appeals in this case and this petition for certiorari.

This reasoning is echoed in the

case of **Blois, supra**, at 942:

> "The plaintiff should not be punished for his attorney's mistake absent a clear record of delay, wilfull contempt or contumacious conduct. **Hassenflu v. Pyke**, 491 F.2d 1094, 1095 (5th Cir. 1974)."

In the case at bar, there was no showing or determination that the attorneys' conduct amounted to wilfull contempt or contumacious conduct. Regarding a determination of delay, the suit itself had been filed only $1\frac{1}{2}$ years before the dismissal and the court relied on the fact that the docket did not show any activity for the previous 12 months. As related in the Statement of the Case, above, plaintiffs' attorneys submitted extensive moving papers to document that motions had been prepared on behalf of plaintiffs at the time of the dismissal.

IV. SINCE THE COURTS FAVOR TRIAL ON THE MERITS, THE DISMISSAL FOR LACK OF PROSECUTION SHOULD HAVE BEEN SET ASIDE.

The federal courts were created to try cases on their merits and render judgments in accordance with the substantial rights of the parties.

> "This court has noted that '[t]he philosophy of modern federal procedure favors trials on the merits.' **Dormeyer Co. v. M.J. Sales & Distributing Co.**, 461 F.2d 40, 43 (7th Cir. 1972), quoting **Thorpe v. Thorpe**, 364 F.2d 692, 694 (D.C.Cir. 1966)."

Ellingsworth, supra, at 185.

In **Meehan, supra,**, the 2nd Circuit reversed a default judgment noting that the Federal Rules of Civil Procedure should have been observed in spirit and in letter.

> "It has been declared in the Courts of Appeals that matters involving large sums of money should not be determined by default judgments if it can be reasonably avoided. **Tozer v. Charles A. Krause Milling Company**, 3 Cir., 189 F.2d 242, 245."

Rooks v. American Brass Company, 263 F.2d 166, (C.A.6th Cir., 1959).

In the case at bar, plaintiffs are seeking lost wages and damages in excess of $100,000.00. It is respectfully urged that in the spirit and letter of the Federal Rules of Civil Procedure, their claims be decided on the merits.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be granted.

Respectfully submitted,

WILLIAM SIMS
SCOTT D. RODMAN,
Of Counsel

APPENDIX A

In the United States Court of Appeals
for the Second Circuit

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 2nd day of April, one thousand nine hundred and eighty-seven.

Present:
HONORABLE WILFRED FEINBERG,
Chief Judge
HONORABLE WILLIAM H. TIMBERS,
HONORABLE FRANCIS X. ALTIMARI,
Circuit Judges.

GLENN BELL, et al.,
Plaintiffs-Appellants,

-against- 86-7939

TEAMSTERS LOCAL UNION NO. 317, Syracuse New York, etc. and NAUM MOVING AND STORAGE COMPANY, INC.,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Northern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the judgment of said district court is AFFIRMED substantially for the reasons stated in the order of Chief Judge Howard G. Munson filed January 7, 1987.

WILFRED FEINBERG, Chief Judge

WILLIAM H. TIMBERS,

FRANCIS X. ALTIMARI,
Circuit Judges.

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

GLENN BELL, DALE W. STUPER, DAVID J. STUPER, MARTIN J. COOLEY, DALE BROWN, Drivers; FRANCES McALLISTER, BARBARA F. McALLISTER, ALAN F. GILDEMEYER, RICHARD AXE, Packers;and PAT EUSON, Helper,

Plaintiffs,

v. 85-CV-447

TEAMSTERS LOCAL UNION NO. 317, Syracuse, New York, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

and

NAUM MOVING AND STORAGE COMPANY, INC.,

Defendants

APPEARANCES: OF COUNSEL:

SCOTT D. RODMAN, ESQ.
BARBARA S. SIMS, ESQ.
Attorneys for the Plaintiffs
280 Humboldt Parkway
Buffalo, New York 14214

STEWART WEISMAN, ESQ.
Local Counsel for Plaintiffs
P.O. Box 1039
Syracuse, New York 13201

BLITMAN & KING JULES L. SMITH ESQ.

Attorneys for Defendant
Teamsters Local Union No. 317
Suite 1100
500 South Salina Street
Syracuse, New York 13202

BOND, SCHOENECK & KING — THOMAS J. GROOMS, ESQ.
Attorneys for Defendant Naum
Moving Storage Company, Inc.
One Lincoln Center
Syracuse, New York 13202

HOWARD G. MUNSON, C.J.

MEMORANDUM-DECISION AND ORDER

After failing to take any action in this lawsuit for over one year, this case was called on the dismissal calendar under Rule 11 of the General Rules of the Northern District of New York.(1) Plaintiffs' attorney failed to appear in court on the date the case was called, September 26, 1986, after the Clerk of Court sent notice to plaintiffs' attorney at the address contained in the Clerk's records. On that date, September 26, the case was dismissed for plaintiffs'

failure to prosecute under local Rule 11, and the Clerk was directed to enter judgment in favor of defendants. Judgment was entered on October 3, 1986, and copies of the judgment were sent to counsel.

Thereafter, on October 8, 1986, plaintiffs' attorneys sent the court a request for an order to show cause why the judgment should not be set aside under Rule 60 (b) (1). (2) Plaintiffs' attorney, Scott Rodman and Barbara Sims, stated in their submitted affidavits that their failure to appear in court on September 26 was due to their failure to receive a notice from the Clerk. The clerk apparently sent notice to Mr. Rodman and/or Ms. Sims at the Baldwinsville, New York address listed on the docket sheet. Both Mr. Rodman and Ms. Sims apparently no longer maintain offices in Baldwinsville, but both

practice out of the same office in Buffalo, New York, located in the Western District of New York. Mr. Rodman states that he mailed a change of address forn to the U.S. Postal Service. Apparently because he never received notice of the case being called for September 26, he assumes that the notice was sent to Ms. Sims at the Balwinsville address and not forwarded to Mr. Rodman because he was not the addressee. Neither Mr. Rodman nor Ms. Sims notified the Clerk of their change of address in this case.(3) Both Mr. Rodman and Ms. Sims state that Ms. Sims received a copy of the judgment mailed to Ms. Sims at her Buffalo address.(4)

The complaint in this case was filed on March 29, 1985 asserting claims under 301 of the National Labor Relations Act, 29 U.S.C. 185, for breach of a collective bargaining agreement and duty

of fair representation. In May of 1985 defendant Teamsters Local Union No. 317 ("Teamsters") and defendant Naum Moving and Storage Company, Inc. ("Naum") filed separate responses to plaintiffs' Request for Production of Documents.(5) On June 14, 1985 defendant Teamsters filed 10 separate sets of interrogatories and requests for production of documents addressed to plaintiffs. Dos. Nos. 8-17. Plaintiffs never filed responsive papers with the Clerk of Court. On July 26, 1985 this case was called on the court's status calendar. No attorney appeared on behalf of the plaintiffs. Rather, Mr. Williams, not a licensed attorney, appeared for Mr. Rodman. A stipulation to extend the plaintiffs' time to respond to defendant Teamsters' discovery requests was filed extending plaintiffs' time to respond to August 7, 1985. In the interim defendant

Teamsters' attorney submitted an ex parte request for an order compelling plaintiffs' responses to the outstanding discovery requests. This request was granted ex parte and the order was filed on August 13, 1985. Doc. No. 19. This order compelled plaintiffs to respond to defendant Teamsters' discovery requests within 20 days of the date of receipt of the order.(6)

After the order compelling plaintiffs to respond to defendants' discovery requests there was absolutely no activity rflected on the docket sheet until over one year later when the case was called on the Dismissal Calendar on September 26, 1986. At that time no one appeared for the plaintiffs and the action was dismissed for failure of the plaintiffs to prosecute under Rule 11 of the General Rules of the Northern District of New York. The Clerk mailed

the judgment to the parties. Then Mr. Rodman came forward to request that the judgment be set aside. Finding absolutely no good cause to set aside the judgment, plaintiffs' request in denied.

Under Rule 60 (b)(1), a judgment may be set aside by the District Court due to "mistake, inadvertance, surprise, or excusable neglect." Plaintiffs' attorney argue that their inadvertance in notifying the Clerk of the Court of their change of address thereby preventing their receiving notice of the case being on the dismissal calendar should satisfy the standard of Rule 60 (b)(1) for setting aside the judgment.

Plaintiffs' attorneys state that they moved their practice to the law offices of William Sims in Buffalo in April, 1985. This was five months prior to the case being called on the dismissal calendar. Plaintiffs' attorneys

therefore had five months within which to notify the Clerk, the Court, and/or opposing counsel on the their change of address, yet they failed to do so. Also, more than a change of address was required upon plaintiffs' attorney moving their law practice to Buffalo. Buffalo is outside the Northern District of New York. Therefore, to continue to litigate, plaintiffs' attorneys were required under Rule 4, General Rules of the Northern District of New York, to designate local counsel for service of papers, i.e., the rule that required that plaintiffs designate some attorney with offices within the Northern District of New York to serve as local counsel. This too was not done.

The eventuality that that case would be called on the dismissal calendar cannot be said to be a suprise to plaintiffs' attorneys. Although they

assert they did not receive notice that the case would be called on September 26, 1986, ignorance of the local rule of this District providing for the calling of cases for dismissal after one year of inactivity is not the type of surprise contemplated by Rule 60 (b)(1). Ignorance of the law including the rules of this court cannot excuse an attorney's failure to take some action to prosecute the case. Plaintiffs' attorneys neglected this case in the following manner: (1) failure to take any action on the case as reflected on the docket in over one year; (2) failure to respond to defendant Teamsters' discovery requests over one year after being ordered to do so; (3) failure to advise the court, the clerk, or opposing counsel of their change of address to outside of the district or designating local counsel within the district; (4) failure to

appear at the status calendar on September 26, 1986.

Relief from judgment under Rule 60 (b), Fed. R. Civ. P., is dependant on a balancing of the policies of hearing litigants' claim on the merits against achieving finality. Plaintiffs will be relieved from an adverse judgment only if their attorneys' actions or inaction constitutes "excusable neglect." In this case plaintiffs' attorneys have failed to offer any reason for their failure to change their address on file in the clerk's ofice or designate local counsel during the one-year period prior to the dismissal other than neglect; no excuse is proferred other than mere oversight. Failure to notify the clerk or the court of their change of address resulted in plaintiffs' attorneys' presumed failure to receive notice that the case was to be called on the dismissal calendar.

Although plaintiffs' attorneys seek relief from judgment based on their failure to receive this notice, the dismissal was not based solely on plaintiffs' attorneys' failure to appear at the dismissal calendar. Rather, plaintiffs had not taken any action in the case in over one year and had not complied with an order of this court issued August 13, 1985 compelling plaintiffs to comply with defendants' discovery requests. It is far from certain whether this court would be inclined to permit plaintiffs to proceed in this case even if plaintiffs' attorneys had appeared at the dismissal calendar.

Both defendants' attorneys sent plaintiffs' attorneys letters stating their views that the lawsuit was absolutely without any foundation in the law and therefore constituted a violation

of Rule 11, Fed. R. Civ. P. Faced with total inaction by the plaintiffs in over one year, defendants could reasonably rely on plaintiffs' inaction as indicative of a desire to not prosecute the case. In fact, defendant Naum asserts through its attorney that it was their understanding via newspaper accounts that plaintiffs intended to discontinue the action as against Naum. Naum's attorney sent plaintiffs' attorneys a stipulation of discontinuance which was never signed.

In order to avoid needless protraction of litigation, it is necessary to be relieved from judgment under Rule 60 (b), that a plaintiff demonstrate that he has a meritorious claim. This does not appear to be so in this case. Rather, plaintiffs' attorneys attempt to circumvent this requirement by submitting a copy of an amended complaint

which they assert they were in the process of preparing at the time they received notice of the judgment. Despite plaintiffs' attorneys' attempt to circumvent this requirement by attempting to argue the meritoriousness of their lawsuit based on as unsubmitted amended complaint, the neglect by plaintiffs' attorneys is too great to be called in any way excuseable.

Therefore, plaintiffs' motion for Relief from the Judgment of Dismissal entered on October 3, 1986 is hereby denied.

IT IS SO ORDERED.

Dated: January 7, 1987
Syracuse, New York

Howard G. Munson
Chief U.S. District Judge

FOOTNOTES

1 Rule 11, General Rules of the Northern District of New York provides:

> Civil causes in which no action has been taken for more than one year

> may be called for review upon not less than fifteen (15) days'notice by mail addressed to the attorneys of record, or to the parties if appearing pro se. The court may thereupon enter an order dismissing the cause for want of prosecution, or continuing it, or may make such other order as justice may require.

2 Mr. Rodman's application to the court requested relief under both Rule 60 (b) (1) and Rule 55 (c), Fed. R. Civ. P. Since there was a judgment entered and no default was entered by the Clerk, the application under Rule 55 (c) is inapplicable and of no effect. Accordingly, plaintiffs' request for relief from judgment in considered solely under Rule 60 (b) (1)

3 Mr. Rodman states that he sent a notice to the court of his change of address in another case. This will not be construed as notice to the Clerk of a change of address in this case. There is no indication nor do plaintiffs' attorneys assert that they ever notified opposing counsel in this case of their address change. Also, the court notes that upon moving their offices out of the District to Buffalo, plaintiffs' counsel had an affirmative obligation under Rule 3 to obtain local counsel within the Northern District. Thes was not done prior to plaintiffs' attorneys' application to set aside the judgment.

4 A copy of a letter from the defendant Teamsters' attorney, Jules Smith, submitted by plaintiffs' attorneys indicates that Mr. Smith sent both attorneys a copy of the order of dismissal signed by the court. The copy

to Ms. Sims was sent to her current address in Buffalo; Mr. Rodman's copy was sent to his Baldwinsville address. Mr. Rodman claims to have never received his copy because of the mistake in the address in Mr. Smith's letter: 1414 Sunset Terrace insted of 14 Sunset Terrace. But the court notes that the address also contains a post office box; this box number is listed below the street address and therefore, based on publicly-known postal service procedure, the letter could be expected to be delivered to the post office box. Accordingly, if Mr. Rodman had a forwarding order on file with the post office, he should have received the copy of the order mailed by Jules Smith.

5 The defendants' responses to plaintiffs' request for production of documents indicate that they are responsive to plaintiffs' requests dated April 5, 1985 (Naum) and April 9, 1985 (Teamsters). Plaintiffs did not file their requests with the Clerk of Court and accordingly there is no record of this activity on the part of plaintiffs.

6 It appears that defendant Teamsters' attorneys were slightly overzealous in making the request to compel; the order was signed July 31, 1985, prior to the date provided for in the stipulation for extension of time, August 7, 1985. However, the order was not filed until August 13, 1986 hereby working no disadvantage on plaintiffs. No responses by plaintiffs to defendant Teamsters' discovery requests were ever filed with the court clerk although reference is made in defendant Teamsters' papers to plaintiffs' having provided partial answers thereto.

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

GLENN BELL, DALE W. STUPER, DAVID J.STUPER, MARTIN J. COOLEY, DALE BROWN,Drivers; FRANCES McALLISTER, BARBARA F. McALLISTER, ALAN F. GILDEMEYER, RICHARD AXE, Packers; and PAT EUSON, Helper,

ORDER

Plaintiffs,

-against-

TEAMSTERS LOCAL UNION NO. 317, Syracuse,New York, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America,

-and-

NAUM MOVING AND STORAGE COMPANY,INC.,

Civil Action No. 85-CV-447

(Munson, C.J.)

Defendants

This couse having duly come on to be heard pursuant to notice by the Court for determination as to whether this action should be dismissed, and after hearing

Bond, Schoeneck & King, by Thomas J. Grooms, Esq., of Counsel, attorneys for defendant Naum Moving and Storage Company, Inc., and Blitman and King, by Donald D. Oliver, Esq., of Counsel, attorneys for defendant Teamsters Local Union No. 317, in support for dismissal for failure of plaintiffs to prosecute, and plaintiffs not having appeared or showed just cause why this action should not be dismissed, and it appearing to the Court that plaintiffs have failed to prosecute this action with due diligence it is

ORDERED, that this action be and it is hereby dismissed with prejudice for want of prosecution.

DATED: October 1, 1986

_____

United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

GLENN BELL, et al.,

Plaintiffs

-vs.- Civil No. 85-CV-447

TEAMSTERS LOCAL UNION NO. 317, et al.,

Defendants

PROCEEDINGS held September 26, 1986 at the United States Federal Courthouse, Syracuse, New York, before the Honorable HOWARD G. MUNSON, Chief Judge, United States District Court, Northern Disrict of New York.

APPEARANCES

SCOTT RODMAN
Attorney for the Plaintiffs
NO APPEARANCE

BOND, SCHOENECK & KING
Attorney for the Defendant,
Naum Moving & Storage
BY: THOMAS J. GROOMS

BLITMAN & KING, ESQS.
Attorney for the Defendant,
Teamsters Local Union No.317
BY: DONALD OLIVER

COURT CLERK: Glenn Bell, et al.,versus Teamsters Local Union Number 317, et al.,85-CV-447. May we have your appearances for the record, please.

MR. GROOMS: Bond,Schoeneck & King by Thomas J. Grooms on behalf of Naum Moving & Storage.

MR. OLIVER: Donald Oliver, Blitman and King, on behalf of Defendant Teamsters Local 317.

THE COURT: What is the situation in this case?

MR. GROOMS: It should be dismissed Your Honor. Nothing has really happened with this case for quite some time. We had a status conference back in July of 1986, a Naum lawyer appeared on behalf of Plaintiff's Counsel--

THE COURT: That was July of '85.

MR. GROOMS: I am sorry, '85.--and nothing substantive had occured in the case up to that point. From the position of Defendant Naum, it is awfully difficult to spend our client's money in connection with this case. There really is simply no case whatsoever. We have that pointed out in a Rule 11 letter to Plaintiff's Counsel. At one point they had indicated to us that they would withdraw the action against Naum, in fact, did so, in fact it was in the newspapers that they had made that decision. I sent them a stipulation of dismissal which was agreed to for months. They did not send it back. I finally got a letter saying they had reconsidered and were going to renig on their decision to drop us from the case. So really nothing further has happened on Plaintiff's part since then and we have been waiting to see whether they would

change their minds.

MR. OLIVER: We served as interrogatories on behalf of Local 317 in January, 1985 after several extensions of time when they still weren't answered, we obtained an order from the Court directing that answers be provided. The answers that were susequently provided were incomplete and on March 17, 1986, we sent a Rule 11 letter to Plaintiff's Counsel and also specifically requested that those interrogatories which had not been answered be answered. We received no response whatsoever to the Rule 11 letter requesting that they voluntarily dismiss. We received no additional answers to the interrogatories. Our position is that the complaint doesn't state a claim but that certainly the Plaintiff's failure to prosecute should result in a dismissal of this action at this point.

THE COURT: I will dismiss it for failure to prosecute.

END OF PROCEEDINGS.

APPENDIX E

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

GLENN BELL, DALE W. STUPER, DAVID J. STUPER, MARTIN J. COOLEY, DALE BROWN, Drivers; FRANCES McALLISTER, BARBARA F. McALLISTER, ALAN F. GILDEMEYER, RICHARD AXE, Packers; and PAT EUSON, Helper,

CIVIL ACTION NO. 85-CV-447

(Munson, C.J.)

Plaintiffs,

NOTICE OF APPEAL

vs.

TEAMSTERS LOCAL UNION NO. 317, Syracuse, New York, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America,

and

NAUM MOVING AND STORAGE COMPANY, INC.,

Defendants.

Notice is hereby given that GLENN BELL, DALE W. STUPER, DAVID J. STUPER, MARTIN J. COOLEY, DALE BROWN, FRANCES McALLISTER, BARBARA F. McALLISTER, ALAN F. GILDEMEYER, RICHARD AXE and PAT EUSON, plaintiffs above named, hereby appeal to the United States Court of Appeals for the Second Circuit from the final judgment dismissing this action entered in this action on October 3, 1986.

Dated: October 27, 1986

SCOTT D. RODMAN, Esq.
BARBARA M. SIMS, Esq.
Attorneys for the
Plaintiffs
280 Humboldt Parkway
Buffalo, New York 14214

Supreme Court, U.S.
FILED
AUG 19 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-130

In The

Supreme Court of the United States

October Term, 1987

GLENN BELL, DALE W. STUPER, DAVID J. STUPER, MARTIN J. COOLEY, DALE BROWN, Drivers; FRANCES McALLISTER, BARBARA F. McALLISTER, ALAN F. GILDEMEYER, RICHARD AXE, Packers; and PAT EUSON, Helper,

Petitioners,

vs.

TEAMSTERS LOCAL UNION NO. 317, Syracuse, New York, affiliated with the International Brotherhood of Teamsters, Chaffeurs, Warehousemen and Helpers of America,

and

NAUM MOVING AND STORAGE COMPANY, INC.,

Respondents.

BRIEF OF RESPONDENT TEAMSTERS LOCAL UNION NO. 317 IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

BLITMAN AND KING
Attorneys for Respondent Teamsters Local Union No. 317
Office and Post Office Address
The 500 Building, Suite 1100
500 South Salina Street
Syracuse, New York 13202
Telephone: (315) 422-7111

Of Counsel:

JULES L. SMITH, ESQ.
(Counsel of Record)
DONALD D. OLIVER, ESQ.

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

QUESTIONS PRESENTED

1. Have petitioners set forth sufficient evidence of the existence of a meritorious claim against Teamsters Local Union No. 317 to support vacating the dismissal?
2. Did the District Court properly exercise its inherent power to manage its affairs within the permissive range of its discretion when it dismissed the action for petitioners' failure to prosecute with due diligence?

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No. 87-130

In The

Supreme Court of the United States

October Term, 1987

GLENN BELL, DALE W. STUPER, DAVID J. STUPER, MARTIN J. COOLEY, DALE BROWN, Drivers; FRANCES McALLISTER, BARBARA F. McALLISTER, ALAN F. GILDEMEYER, RICHARD AXE, Packers; and PAT EUSON, Helper,

Petitioners,

vs.

TEAMSTERS LOCAL UNION NO. 317, Syracuse, New York, affiliated with the International Brotherhood of Teamsters, Chaffeurs, Warehousemen and Helpers of America,

and

NAUM MOVING AND STORAGE COMPANY, INC.,

Respondents.

BRIEF OF RESPONDENT TEAMSTERS LOCAL UNION NO. 317 IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

Petitioners seek review of a decision by the United States Court of Appeals for the Second Circuit which affirmed the District Court's dismissal of plaintiffs' lawsuit for failure to prosecute. Respondent Teamsters Local Union No. 317 opposes the issuance of a writ of certiorari to review the decision of the District Court and Court of Appeals because the decisions below were clearly correct and there is no conflict among the circuits on an issue herein requiring resolution by this Court.

OPINIONS BELOW

References to the opinions and judgments delivered in the courts below are set forth in the petition at page 1.

JURISDICTION

The alleged jurisdictional requisites are set forth in the petition at page 1.

STATUTORY PROVISIONS AND RULES INVOLVED

Section 101(a)(4) of the Labor-Management Reporting and Disclosure Act, 29 U.S.C. § 411(a)(4), is reprinted at RA-1 of the appendix to this brief. Rules 3 and 11 of the General Rules of the United States District Court for the Northern District of New York are reprinted at RA-1 and RA-2 of the appendix to this brief.

STATEMENT OF THE CASE

Background of Case

This action, purportedly styled as a hybrid Section 301/duty of fair representation suit, was filed on March 29, 1985. The complaint alleged that Naum Moving and Storage Company, Inc. ["Naum"] violated a collective bargaining agreement and that Teamsters Local Union No. 317 ["Local 317" or the "Union"] breached its duty

of fair representation in connection with negotiations for a new labor contract.

After the filing of answers by defendants Naum and Local 317, plaintiffs served separate requests for production of documents upon defendants in April, 1985. Defendants Naum and Teamsters Local 317 filed their responses to said discovery requests in May, 1985.

On June 13, 1985, Local 317 served its First Set of Interrogatories and Requests to Produce ["Interrogatories/Requests"] upon each of the individually-named plaintiffs. When no responses were received, Local 317 moved for and obtained an order compelling answers to the Interrogatories/Requests.[1]

Thereafter, on or about September 3, 1985, Local 317 received partial responses to the Interrogatories/Requests from eight of the ten individual plaintiffs. By letter dated March 17, 1986, Local 317's attorneys advised plaintiffs of their position that this case contained no legally cog-

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[1] When no responses to the Interrogatories/Request were received and no request for an extension of time was made within the time provided under the Federal Rules, Local 317, on July 19, 1985, forwarded a motion to compel responses to the district court. After the motion had been forwarded, plaintiffs' attorney, Scott D. Rodman, Esq., contacted Local 317's attorneys and requested an extension of time to respond to the Interrogatories/Requests to August 7, 1985. On July 29, 1985, Attorney Rodman forwarded a Stipulation to Extend Time, which was immediately executed by Local 317's attorneys. Thereafter, on August 2, 1985, Local 317's attorneys received a signed order from the district court compelling answers to the Interrogatories/Request. Since an extension of time had already been granted, Local 317 took no action to serve the order. When no responses were received by August 7, 1985, however, a copy of the order compelling responses within 20 days was forwarded to Attorney Rodman. The order was filed with the district court on August 13, 1985.

nizable claims against Local 317 and, therefore, that plaintiffs were obligated to voluntarily dismiss the action pursuant to Rule 11 of the Federal Rules of Civil Procedure. The letter also pointed out that plaintiffs had failed to fully answer Local 317's Interrogatories/Requests in accordance with the district court's order compelling answers. No response was received to the letter of March 17, 1986.

By notice dated September 8, 1986, all parties were instructed to appear before the district court at a dismissal calendar call on September 26, 1986 and show cause why the action should or should not be dismissed. On September 26, 1986, attorneys for defendants Naum and Local 317 appeared at the dismissal calendar call and presented argument in support of dismissal for lack of prosecution. Plaintiffs' attorneys failed to appear at the dismissal calendar call.

After hearing argument from defendants' attorneys, the district court dismissed the action for lack of prosecution. An Order of Dismissal was subsequently entered on October 3, 1986.

The Decision of the District Court

By order to show cause, dated October 23, 1986, plaintiffs brought a motion pursuant to Federal Rule 60(b) for relief from the Order of Dismissal. Following service of affidavits and memoranda by defendants Naum and Local 317 in opposition to the motion, oral argument was held before the district court on November 7, 1986. On January 7, 1987, the district court issued a Memorandum-Decision and Order denying plaintiffs' motion for relief from the October 3, 1986 Order of Dismissal.

The Decision of the Court of Appeals

On January 12, 1987, plaintiffs reinstated the appeal in this case before the Second Circuit.[2] Oral argument was presented to the Court of Appeals on April 1, 1987 and, by Order dated April 2, 1987, the Court of Appeals affirmed the judgment of the District Court for the reasons set forth in Chief Judge Munson's Memorandum-Decision and Order of January 7, 1987.

On July 1, 1987, plaintiffs applied for a writ of certiorari to this Court seeking review of the Court of Appeals' judgment.

—o—

REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

This Court's discretionary review of decisions of the United States Courts of Appeals by writ of certiorari is generally limited to cases: where there is a conflict among the circuits on the same matter; where an important issue of federal law is presented which has not been, but should be, settled by this Court; or where a federal question has been decided in a way that conflicts with applicable decisions of this Court.[3] As more fully discussed herein-

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[2] Plaintiffs initially filed a Notice of Appeal on October 28, 1986. Plaintiffs then filed a Rule 60(b) motion with the district court for reconsideration of the dismissal for lack of prosecution. Following a pre-argument conference with Staff Counsel for the Court of Appeals on December 2, 1986, the parties executed a Stipulation for withdrawal of the appeal without prejudice and subject to reinstatement after the district court's decision of plaintiffs' then pending motion for reconsideration.

[3] See Rule 19(b)(1) of the Supreme Court Rules.

after, the above reasons for granting certiorari are totally absent in the instant case. It is submitted, therefore, that there is no legal issue warranting certiorari.

First, there is no conflict among the circuits on an issue herein. It is uniformly recognized that the district courts possess authority to dismiss actions for lack of prosecution in appropriate circumstances. The district court's initial dismissal and denial of the motion for relief under Rule 60(b) were based upon the particular facts and circumstances of this case and did not purport to set forth any general rule of law.

Second, there is no important question of federal law which has not been, but should be settled by this Court. The Second Circuit affirmed the district court's decision based upon its finding that the record in this case did not warrant relief from dismissal. Rule 60(b) specifically provides for an analysis of the facts on a case-by-case basis in determining whether a party is entitled to relief from judgment. The decision of the lower courts herein fully accorded with the provisions of Rule 60(b).

Finally, the decisions of the courts below are in full accord with previous decisions of this Court. The district court's dismissal of plaintiffs' action, based upon review of the entire record, was a proper exercise of its inherent discretion as articulated by this Court in *Link v. Wabash Railroad Co.*, 370 U.S. 626 (1962).

———o———

ARGUMENT

POINT I

THE COURT OF APPEALS ACTED PROPERLY IN AFFIRMING THE ORDER OF DISMISSAL BECAUSE PLAINTIFFS FAILED TO DEMONSTRATE A MERITORIOUS CLAIM

A prerequisite for relief from judgment under Rule 60(b)(1) of the Federal Rules is the movant's demonstration of a meritorious claim.[4] In the present case, since plaintiffs have wholly failed to establish a meritorious claim, the district court properly denied plaintiffs' motion to vacate the dismissal. Accordingly, the Court of Appeals properly affirmed the district court's judgment.

A. The Complaint Fails To State A Claim For Breach Of The Duty Of Fair Representation.

The statutory duty of fair representation is breached only when a union's conduct toward a member is arbitrary, discriminatory, or in bad faith. *Vaca v. Sipes,* 386 U.S. 171, 190 (1967). Moreover, a union is allowed a wide range of reasonableness, *Ford Motor Co. v. Huffman,* 345 U.S. 330, 338 (1953), so long as it acts honestly and in good faith on wholly relevant considerations and not upon capricious or arbitrary factors. *Humphrey v. Moore,* 375 U.S. 335, 350 (1964). A breach of the duty of fair representation may not, therefore, be established merely upon allegations that a union has performed poorly in its capacity

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[4] *Marshall v. Monroe & Sons, Inc.,* 615 F.2d 1156 (6th Cir. 1980); *Ben Sager Chemicals Intern, Inc. v. E. Targosz & Co.,* 560 F.2d 805 (7th Cir. 1977); *Universal Film Exchanges, Inc. v. Lust,* 479 F.2d 573 (4th Cir. 1973).

as collective bargaining agent. In the instant case, since plaintiffs' claims are predicated exclusively upon their dissatisfaction with the results of negotiations between Naum and Local 317, no legally cognizable claim is presented.

The federal courts have repeatedly rejected claims against unions alleging breach of the duty of fair representation based upon dissatisfaction with the results of collective bargaining. In *Maurer v. U.A.W.*, 105 LRRM 2883 (M.D. Pa. 1980), for example, the court held that an international union and its local did not breach their duty of fair representation when they agreed to abrogate an arbitrator's award that authorized preferential hiring and retroactive seniority for employees who had been discharged for engaging in a wildcat strike.

In *Maurer*, the plaintiffs were discharged strikers who argued that the defendant unions acted arbitrarily by acquiescing to the employer's demand during negotiations that plaintiffs' re-employment opportunities under the arbitration award be vitiated, thereby sacrificing plaintiffs' employment interests to advance the seniority and job security of incumbent employees. In granting summary judgment to the unions and the employer, the court emphasized that the employer's adamant insistence upon abrogation of the arbitration award as an absolute precondition of agreement was of paramount consideration in evaluating the unions' actions. The court held that:

> The record does not support the charge of arbitrary conduct but, contrariwise, demonstrates a realistic, reasonable exercise of discretion based upon a good-faith consideration of wholly relevant factors. Of paramount relevance is the undisputed fact that [the em-

> ployer] made the arbitration award its most imporant concession demand and emphasized repeatedly that it would take a strike rather than allow the award to continue to have force and effect. A recognition by the unions of the futility of a strike call . . . . can hardly be termed arbitrary. . . . After numerous negotiating sessions, during which it became obvious that [the employer] would not retreat from its announced position, the proposal was accepted on the day the contract was due to expire. . . . In sum, aside from some conclusory allegations, I find absolutely no indication of arbitrary, or bad-faith conduct on the part of the defendant unions.

105 LRRM at 2886.[5]

Similarly, in *Aikens v. Abel*, 373 F. Supp. 425 (W.D. Pa. 1974), the court dismissed a complaint alleging that the Steelworkers Union had breached its duty of fair representation by failing to submit a collective bargaining agreement to the entire membership for ratification. In *Aikens*, due to the disastrous effects of a boom-bust cycle emanating from the nationwide steel strike of 1959, representatives of employers in the steel industry and the United Steelworkers Union agreed upon a national labor agreement which substituted binding arbitration for the right to strike in the event of an impasse in negotiations. The agreement was ratified at a nationwide meeting of

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[5] The court in *Maurer* also found that the union did not breach the duty of fair representation by failure to give plaintiffs notice of (a) the pendency of negotiations; (b) the employer's proposal to abrogate the arbitrator's award; and (c) the time and date of the ratification of the meeting at which the contract was adopted. The court reasoned that, although it would have been preferable to notify plaintiffs of the employer's position and the scheduled ratification meeting, the union really had no option but to accept the employer's proposal.

local union representatives. Although local union presidents who were to attend the meeting were sent a letter which informed them when and where the meeting would be held, it said nothing as to the proposed subject matter. Prior to the ratification vote on the national agreement at the meeting, a motion from the floor that the vote be postponed until the local union officers could consult with their membership was defeated.

The plaintiffs in *Aikens,* dissident members of the Steelworkers Union, subsequently commenced a federal court action, alleging that the international union had violated its duty of fair representation by failing to inform delegates that the purpose of the meeting was ratification of the national agreement, and by failure to submit the collective bargaining agreement to the general membership for ratification. The court, in dismissing plaintiffs' claims, held that:

> Given the "wide range of reasonableness . . . allowed a statutory bargaining representative" in the negotiation of the labor agreements, [citation omitted], this Court expressly finds that such conduct was not arbitrary and was not violative of the union's duty of fair representation.

Id. at 432-33.

Under similar circumstances, the federal courts have also found no breach of a union's fiduciary duties under Section 501 of the Labor Management Reporting and Disclosure Act in failing to negotiate a "satisfactory" contract. Thus, in *Carr v. Learner,* 547 F.2d 135 (1st Cir. 1976), a union member alleged that union officers had violated Section 501 by failing to obtain a better retirement plan for him than the one currently existing. In

rejecting the existence of any cognizable claim based solely upon the member's dissatisfaction with the results of the collective bargaining process, the court held that:

> [A]ssuming, however, that § 501 reaches conduct during the collective bargaining process, we do not think that the fiduciary duty imposed by it is violated in a case where nothing more is alleged than poor performance as a collective bargaining agent. *See Aikens v. Abel,* 373 F. Supp. 425, 433, 85 LRRM 2786 (W.D. Pa. 1974). While § 501 surely imposes obligations in addition to "the punctilio of an honor the most sensitive", *Meinhard v. Salmon,* 249 N.Y. 458, 464 (1928) (*Cardozo, C.J.*), on those to whom it is addressed, we do not believe that it permits a cause of action to be stated whenever a union member is dissatisfied with the results of the collective bargaining process. Although a fiduciary relationship implies certain affirmative, as well as negative obligations [citations omitted], it does not require that collective bargaining agents necessarily obtain what hindsight reveals to be *optimal* results. [citation omitted]. *The collective bargaining process is, by definition, too complex and too adversarial in nature to subject the participants in it to liability for every failure fully to satisfy their constituency.*

Id. at 138, [emphasis supplied].

Finally, in *Acri v. Machinists Lodge 115,* 781 F.2d 1393 (9th Cir.), *cert. denied,* — U.S. —, 107 S. Ct. 73 (1986), the Ninth Circuit affirmed summary judgment in an action by laid-off union members alleging that the union breached its duty of fair representation when it made alleged misrespresentations during the contract ratification process. The court of appeals found dismissal warranted because the members could not establish a causal relationship between the union's alleged misrepresentations and their

injury. In an opinion concurring with the granting of summary judgment to the union, Judge Reinhardt concluded that:

> In my view, the union's own election and removal process provides the proper vehicle for addressing complaints like the plaintiffs'. Negotiating labor contracts is difficult enough in these times without the additional threat of lawsuits from unhappy union members, with the attendant possibility of personal liability. Today's labor contracts no longer are automatic vehicles for gains by individual workers. Now, contracts containing cutbacks or reductions in benefits are far from infrequent. Dissatisfaction over the contents of a labor agreement is too easily transformed into a suit over the union official's performance.

Id. at 1399-1400.

In the instant case, plaintiffs' purported claims are based solely upon their dissatisfaction with the results of negotiations for the terms of a new collective bargaining agreement between Naum and Local 317. In that regard, two primary issues emerged during the course of negotiations. First, from the outset of negotiations in April, 1984, Naum insisted upon the inclusion of an "incentive plan" previously implemented in several other areas within New York State, whereby a given time period was designated for the completion of various work assignments. Second, as negotiations progressed, Naum proposed limiting the retroactive effect of the agreed-upon wage increase to two months.

In September and again in October, 1984, plaintiffs and other Naum employees rejected the proposed labor contract and insisted upon elimination of the "incentive plan" proposed, together with a wage increase retroactive

to the expiration date of the old contract. When no agreement was reached, plaintiffs and other Naum employees voted to strike and commenced picketing Naum in September, 1984. Naum subsequently hired permanent replacements for plaintiffs and other striking Naum employees.

Given the facts of this case, it is clear that no cognizable fair representation claim exists against Teamsters Local 317. That Local 317 was unable to successfully negotiate all that plaintiffs desired is not a breach of the duty of fair representation. That Local 317 was not successful in convincing Naum to drop its proposed incentive plan is not a breach of the duty of fair representation. And, that Naum adamantly refused to provide a wage increase retroactive to April 1, 1984, is not related to any alleged breach of the duty of fair representation. In sum, the allegations of the complaint quite simply fail to state a claim for breach of the duty of fair representation.

It is submitted, therefore, that because the complaint fails to state a claim for breach of the duty of fair representation, plaintiffs' claims are without merit. The Court of Appeals affirmance of the order of dismissal, therefore, was correct.

B. Dismissal Was Required As A Matter Of Law Because Of Plaintiffs' Failure To Exhaust Internal Union Remedies.

Section 101(a)(4) of the Labor-Management Reporting and Disclosure Act requires the exhaustion of internal union remedies before resorting to the courts. That section provides, in relevant part, that:

> No labor organization shall limit the right of any member thereof to institute an action in any court . . . *provided that any such member may be required to exhaust reasonable hearing procedures* (but not to exceed a four-month lapse of time) *within such organization, before instituting legal . . . proceedings against such organization* or any officer thereof . . . .

Article XIX, Section 12(a) of the Teamsters International Union's Constitution specifically requires members to exhaust internal remedies prior to commencing any court action. Section 12(a) provides that:

> Every member, officer, elected business agent, Local Union, Joint Council or other subordinate body against whom charges have been preferred and disciplinary action taken as a result thereof, or against whom adverse rulings or decisions have been rendered or who claims to be aggrieved, shall be obliged to exhaust all remedies provided for in this Constitution and by the International Union before resorting to any court, tribunal or agency against the International Union, any subordinate body or any officer or employee thereof.

Article XIX, Section 12(c) states that:

> (c) The appeals procedure provided herein is also available to and must be followed by any member, or former member, who is aggrieved by any decision, ruling, opinion or action of the Local Union, membership, officers, or Executive Board, *including collective bargaining matters.* In the case of collective bargaining matters, there shall be no appeal from decisions of the Joint Council [emphasis supplied].

The federal courts have consistently recognized that the exhaustion requirements in union constitutions are not simply available alternatives which may be disregarded with impunity. Rather, such requirements are manda-

tory in nature and must be satisfied prior to the pursuit of other remedies. Thus, in *Martin v. Kansas City So. Ry.*, 197 F. Supp. 188 (W.D. La. 1961), the court observed that:

> It is elementary that provisions of a union's constitution and by laws are binding upon union members to the extent that such provisions are reasonable and fair. *International Association of Machinists v. Gonzales,* 356 U.S. 617, 78 S. Ct. 923, 2 L.Ed.2d 1018. *Fingar v. Seaboard Airline R. Co., supra,* [277 F.2d 698, 46 LRRM 2042 (5th Cir. 1960)].

Id. at 191.

The court held, therefore, that since plaintiff had failed to follow the procedures of the union constitution, the complaint had to be dismissed. The court said:

> The procedure for adjusting a grievance, as provided for in the Brotherhood Constitution and Protective Laws, was not followed by plaintiff and, therefore, on authority of the Fingar, Gainey, Girard Lodge, Fagan and Dalton cases, *supra,* we must hold that plaintiff is precluded from bringing this action against the Brotherhood and that such action is premature.

Id. at 193.

In the instant case, although alleging various violations of the International Union's Constitution and complaining of Business Agent DelGuidice's purported actions in collective bargaining matters, it is undisputed that plaintiffs failed to pursue or exhaust their internal remedies as required by the Constitution. Thus, plaintiffs did not afford the Union the opportunity to correct any of its alleged "own wrongs". Allowing unions the opportunity to take corrective action is one of the underlying purposes of the exhaustion requirement. In *Detroy v. Guild of Variety*

Artists, 286 F.2d 75 (2d Cir), *cert. denied,* 366 U.S. 929 (1961), the court explained that:

> The Congressionally approved policy of first permitting unions to correct their own wrongs is rooted in the desire to stimulate labor organizations to take the initiative and independently to establish honest and democratic procedures. *See* Cox, *The Role of Law in Preserving Union Democracy,* 72 Harv. L. Rev. 608, 615 (1959). Other policies, as well, underlie the exhaustion rule. *The possibility that corrective action within the union will render a member's complaint moot suggests that, in the interest of conserving judicial resources, no court step in before the union is given its opportunity.* Moreover, courts may find valuable the assistance provided by prior consideration of the issues by appellate union tribunals. *See,* Summers, *The Law of Union Discipline: What the Courts Do In Fact,* 70 Yale L.J. 175, 207 (1960).

Id. at 78 [emphasis supplied].

The court in *Petroff v. Teamsters Local 614,* 96 LRRM 3410 (E.D. Mich. 1977) addressed a factual setting parallel to the case at bar. In *Petroff,* union members challenged the validity of a meeting at which a ratification vote was taken concerning a collective bargaining agreement. The plaintiffs alleged that the meeting was improperly held because it failed to comply with various procedural requirements of the union by-laws.

In granting the union's motion for summary judgment, the court found that plaintiffs' failure to exhaust internal remedies was an absolute bar to maintaining a court action. The court held that:

> It is well settled that exhaustion of internal remedies is required in cases arising under Section 301 of the Labor Management Relations Act. *e.g., Bsharah v. Eltra Corp.,* 394 F.2d 502, 68 LRRM 2255 (6th Cir.

> 1968). *See Vaca v. Sipes,* 386 U.S. 171, 64 LRRM 2369 (1967). Nothing is apparent in this record to suggest that plaintiffs' internal remedies are illusory or fruitless. No history of rejection of complaints like those advanced by plaintiffs here has been shown. This Court concludes that the plaintiffs are barred from maintaining this action because of their failure to exhaust their available non-judicial remedies.

96 LRRM at 3412.

The exhaustion provisions considered in *Petroff,* as contained in the International Brotherhood of Teamsters' Constitution, are precisely the same as those applicable in the instant case. As in *Petroff,* plaintiffs have admittedly not exhausted their remedies under the Constitution. Moreover, plaintiffs have not alleged or demonstrated that exhaustion would have been futile or unable to afford them adequate relief. Indeed, plaintiffs have proffered no excuse whatsoever for their failure to exhaust.

Since it is undisputed that plaintiffs failed to exhaust their internal union remedies as required by the International Union's Constitution, Local 317 was entitled to judgment as a matter of law. The decisions of the courts below, therefore, were proper.

C. Plaintiffs' Claims Are Barred By The Statute Of Limitations.

The statute of limitations applicable to a hybrid Section 301/duty of fair representation action is the six-month limitations period contained at Section 10(b) of the National Labor Relations Act. Because this action was initiated more than six months after the Union's alleged wrongdoing, it is untimely and barred by the statute of limitations.

In *DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151 (1983), this Court applied the six-month statute of limitations to hybrid actions claiming a breach of the duty of fair representation by a union and breach of the collective bargaining agreement by the employer. Finding that the NLRA's six-month limitations period was appropriate, the Court held that:

> In § 10(b) of the NLRA, Congress established a limitations period attuned to what it viewed as the proper balance between the national interests in stable bargaining relationships and finality of private settlements, and an employee's interest in setting aside what he views as an unjust settlement under the collective bargaining system. That is precisely the balance at issue in this case. . . . *Accordingly, "[t]he need for uniformity among procedures followed for similar claims, as well as the clear congressional indication of the proper balance between the interests at stake, counsels the adoption of § 10(b) of the NLRA as the appropriate limitations period for lawsuits such as this."*

Id. at 171 (quoting *United Parcel Service, Inc. v. Mitchell*, 451 U.S. 56 (1981) (Stewart, J., concurring) (citations omitted)) [emphasis supplied].

In the instant case, the complaint was filed on March 29, 1985. Accordingly, any claims for alleged wrongdoing by either Naum or Local 317 prior to September 29, 1984 are time-barred. The gravamen of plaintiffs' alleged claims in this action preceded that date. Naum's insistence upon instituting the "incentive plan" and proposed limitation on retroactivity of the wage increase had occurred prior to September 29. Additionally, the allegedly improper strike vote also occurred outside the limitations period. Indeed, plaintiffs had already commenced strik-

ing and been replaced by Naum prior to September 29, 1985.

Since the claims against Local 317 are barred by the statute of limitations, plaintiffs obviously cannot demonstrate a meritorious action. The dismissal of this action, therefore, was proper.

POINT II

THE DISTRICT COURT PROPERLY EXERCISED ITS DISCRETION IN DISMISSING THE ACTION FOR LACK OF PROSECUTION

The district courts possess inherent authority to dismiss actions for failure to prosecute. In the instant case, based upon the entire record, the district court found that plaintiffs had failed to prosecute with due diligence and, therefore, dismissed the action. Since the district court's dismissal is amply supported by the record and was not an abuse of discretion, the lower court's decision must be affirmed.

In *Link v. Wabash Railroad Co.*, 370 U.S. 626, 629 (1962), this Court noted that "[t]he authority of a federal trial court to dismiss a plaintiff's action with prejudice cannot seriously be doubted." The Court, finding that the district courts are vested with inherent power to dismiss *sua sponte* in the face of inaction or delay, explained that:

> Neither the permissive language of the Rule[41(b)]—which merely authorizes a motion by the defendant—nor its policy requires us to conclude that it was the purpose of the Rule to abrogate the power of courts, acting on their own initiative, to clear their calendars of cases that have remained dormant because of the inaction or dilatoriness of the parties seeking relief.

> The authority of a court to dismiss *sua sponte* for lack of prosecution has generally been considered an "inherent power", governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases.

Id. at 630-31.[6]

In the present case, plaintiffs' failure to prosecute does not involve an isolated instance of inadvertence or excusable neglect. Rather, throughout this litigation, plaintiffs repeatedly failed to adhere to the rules and procedures of the district court. Accordingly, plaintiffs' motion to vacate the Order of Dismissal was properly denied.

Rule 11 of the General Rules of the Northern District provides that:

> Civil causes in which no action has been taken for more than one year may be called for review upon not less than fifteen (15) days' notice by mail addressed to the attorneys of record, or to the parties if appearing pro se. The Court may thereupon enter an order dismissing the cause for want of prosecution, or continuing it, or may make such other order as justice may require.

In the instant case, plaintiffs had taken no action in this case for more than one year prior to the Dismissal Calendar Call on September 26, 1986.

Moreover, the only reason proffered by plaintiffs for their failure to appear at the dismissal calendar call on

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[6] The Court in *Link* also observed that the absence of notice or failure to hold a hearing did not render the dismissal void; adequacy of notice and a hearing turn on a party's knowledge of the consequences of his own conduct. *Id.* at 632. The Court concluded that a district court may dismiss under Rule 41(b) when the circumstances warrant such action, without affording either notice or a hearing before it acts. *Id.* at 633.

September 26 was their purported failure to receive the September 8, 1986 notice from the Clerk's Office. The purported lack of notice, however, is directly attributable to the failure of plaintiffs' attorneys to advise the district court of their change in address.[7]

The complaint in this action sets forth a post office box in Baldwinsville, New York as the office address for both Barbara N. Sims, Esq. and Scott D. Rodman, Esq. The office of the Union's attorneys was never advised that Mr. Rodman had changed his address and moved to Buffalo, or that mail should be forwarded to an address other than that listed on the complaint.

Furthermore, Rule 3 of the Rules of the Northern District specifically requires that all attorneys of record maintain an office for the transaction of business within the district, or that local counsel be designated upon whom service of papers shall be made. In the present case, no designation of local counsel was made by plaintiffs' attorney when he moved his offices to Buffalo in April, 1986.

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[7] The federal courts have repeatedly denied relief from error resulting from mere carelessness. *See Williams v. Five Platters, Inc.*, 510 F.2d 963 (3rd Cir. 1975) (failure of counsel to respond to summary judgment motion due to his absence from office, pressure from other work, omission of matter from his docket, and inability to contact his client, amounted to carelessness and inexcusable neglect); *Greenspun v. Bogan*, 492 F.2d 375 (1st Cir. 1974) (party contesting a settlement in shareholder's derivative suit had inexcusably failed to appear at the settlement hearing). Furthermore, relief under Rule 60(b) has also been denied on the general allegation that the defaulting attorneys were engaged in other business and/or was outside the jurisdiction of the court. *See Schwartz v. United States*, 384 F.2d 833 (2d Cir. 1967) (no abuse of discretion in denial of Rule 60(b) motion where attorney, who was preoccupied with other cases, inexcusably neglected plaintiff's case); *See also Smith v. Stone*, 308 F.2d 15 (9th Cir. 1962).

Rather, Mr. Rodman apparently relied upon the Post Office to forward all mail sent to the Baldwinsville address. Additionally, plaintiffs' attorneys had previously failed to personally appear at a status conference before the district court on July 26, 1985. An individual named William Reidle, a non-lawyer who was not familiar with the case, ostensibly appeared on behalf of plaintiffs' attorneys.

Thus, plaintiffs' attorneys' failure to appear at the dismissal calendar call on September 26, 1986 was not an isolated example of inadvertence or neglect. Rather, it was the crowning event in a course of conduct that has characterized this litigation. Plaintiffs' attorneys had failed to respond to discovery requests, failed to comply with court-ordered disclosure, ~~failed to~~ respond to correspondence from defendants' attorneys, and failed to appear at scheduled conferences before the district court. In short, plaintiffs' attorneys repeatedly failed to follow the established procedures of the district court.

Since any purported lack of notice of the Dismissal Calendar Call on September 26, 1986 was the direct result of plaintiffs' attorneys' failure to provide notification of their change of address or to properly designate local counsel for service of papers within the district, the district court's dismissal of the action for lack of prosecution and denial of plaintiffs' motion under Rule 60(b) was proper. The decision of the lower courts, therefore, should not be disturbed.

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CONCLUSION

For all of the foregoing reasons and authorities, the Court of Appeals correctly concluded that the district court's judgment, which denied plaintiffs' application to vacate dismissal, was supported by the record and, accordingly, enforced that judgment. The petition for writ of certiorari, therefore, should be denied.

Respectfully submitted,

BLITMAN AND KING

Attorneys for Respondent
Teamsters Local Union No. 317
Office and Post Office Address
The 500 Building, Suite 1100
500 South Salina Street
Syracuse, New York 13202
Telephone: (315) 422-7111

Of Counsel:

JULES L. SMITH, ESQ.
(Counsel of Record)
DONALD D. OLIVER, ESQ.

APPENDIX

STATUTORY PROVISIONS AND RULES INVOLVED

Section 101(a)(4) of the Labor Management Reporting and Disclosure Act, 29 U.S.C. § 411(a)(4), provides that:

> No labor organization shall limit the right of any member thereof to institute an action in any court, or in a proceeding before any administrative agency, irrespective of whether or not the labor organization or its officers are named as defendants or respondents in such action or proceeding or the right of any member of a labor organization to appear as a witness in any judicial, administrative, or legislative proceeding, or to petition any legislature or to communicate with any legislator: *Provided,* That any such member may be required to exhaust reasonable hearing procedures (but not to exceed a four-month lapse of time) within such organization, before instituting legal or administrative proceedings against such organizations or any officer thereof: *And provided further,* That no interested employer, or employer association shall directly or indirectly finance, encourage, or participate in, except as a party, any such action, proceeding, appearance, or petition.

Rule 3 of the General Rules of the United States District Court for the Northern District of New York provides that:

> Only members in good standing of the bar of this Court may appear as attorneys of record. Any attorney, solicitor, or proctor of this court, not having an office for the transaction of business in person within this district, when appearing of record in any cause shall specify an attorney of this court maintaining an office in the Northern District of New York for the regular practice of law in person, upon whom service of papers shall be made. Where a party appears in person he shall file with the complaint or other pleading a state-

ment of an address within the district where papers may be served.

Rule 11 of the General Rules of the United States District Court for the Northern District of New York provides that:

> Civil causes in which no action has been taken for more than one year may be called for review upon not less than fifteen (15) days' notice by mail addressed to the attorneys of record, or to the parties if appearing pro se. The Court may thereupon enter an order dismissing the cause for want of prosecution, or continuing it, or may make such other order as justice may require.